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No. 82-168

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSPORTATION MANAGEMENT CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent and its amici (hereinafter "respondent") employ various phrases in an imprecise manner that apparently is designed to give the impression that the Board's *Wright Line* test violates traditional principles of proof and applicable statutory standards. But respondent's statements do not accurately express the Board's test. For example, respondent contends that under its *Wright Line* test the Board may find a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), without identifying the "true reason" or "real motive" of an employer in discharging an employee;[1] but, in fact, the test at issue here applies only in cases in which the Board has concluded that a preponderance of the evidence shows that

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[1]See, *e.g.*, Resp. Br. 19, 28; Chamber of Commerce Br. 7, 10.

an employer had at least two "real motives."[2] Respondent's assumption that there can be only one "real motive" is an oversimplification that applies only to a "pretext" case (not at issue here), not to a "dual motive" case like this one.

Respondent also contends that under the Board's *Wright Line* test the employer loses when "the evidence is in equipoise."[3] The natural response to this contention is, "evidence of what?" Respondent does not identify the issue on which evidence is presented or why it views evidence as in "equipoise" at a certain point. Likewise, at several points respondent refers to the "burden of persuasion" and the "preponderance of the evidence" without explaining the issues to which those terms should apply.[4] Respondent's casual use of phrases does not advance the analysis, but only tends to mischaracterize the Board's test.

2. In our opening brief we explained the manner in which proof is made in a dual-motive case before the Board in an effort to clarify the misunderstanding reflected in the decisions of the courts of appeals that have rejected the Board's *Wright Line* test.[5] However, the briefs of respondent and its amici repeat the same misconceptions that we attempted to dispel. Thus, we believe it appropriate to summarize again the process of proof under the Board's *Wright Line* test. In this connection, it is worth recalling that reference to shifts

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[2]Accordingly, the Chamber of Commerce errs in formulating the question at issue (Chamber of Commerce Br. 6) as "[w]ho shall prevail if, after presentation of all the evidence, the employer's action could have resulted equally from lawful or unlawful motivation."

[3]See, *e.g.*, Chamber of Commerce Br. 10, 11, 16; Council on Labor Law Equality ("COLLE") Br. 5, 49.

[4]See, *e.g.*, Resp. Br. 5, 14; Chamber of Commerce Br. 6, 7, 10.

[5]Since our opening brief was filed the Second Circuit has joined those courts of appeals that have rejected the Board's *Wright Line* test. See *NLRB* v. *New York University Medical Center*, No. 82-4137 (Jan. 21, 1983).

in the burden of persuasion does not signify the order in which the parties introduce evidence during a proceeding; rather, it refers to the manner in which the decision-maker evaluates the evidence once all of it has been presented and it is time for a decision. See *McCormick on Evidence* § 336, at 784 (Cleary ed. 1972).

During a typical Board proceeding both the Board's General Counsel and the employer introduce evidence. Normally, the General Counsel will attempt to show that the employer disciplined or discharged an employee for an unlawful reason (*i.e.*, animus toward an employee's union activity or other protected activity) and that the employer's proffered legitimate reasons for its action are pretextual. The employer will offer evidence to rebut the General Counsel's evidence that it acted on the basis of an improper motive and may attempt to establish an affirmative defense. The employer's evidence may include testimony that rebuts directly the General Counsel's evidence of unlawful motive, and it may also include evidence that the employer acted for a lawful motive. The evidence of a lawful motive can serve two purposes: first, it can help rebut the General Counsel's evidence that the employer acted for an unlawful motive; second, if the employer does not succeed in rebutting the General Counsel's evidence of unlawful motive, the employer can use the evidence of a lawful motive to establish an affirmative defense, *i.e.*, that it should not be held liable for a violation of the Act even if it had an unlawful motive, because it would have taken the same action in the absence of the protected activity.

After both parties have submitted their evidence, the decision-maker, initially an Administrative Law Judge ("ALJ"), considers the evidence. First, the ALJ determines whether the General Counsel has established by a preponderance of the evidence that the employer acted for an unlawful reason. At this stage the ALJ considers both the

General Counsel's evidence of unlawful motive and all of the employer's evidence that would tend to rebut the existence of an unlawful motive, including evidence of any lawful motive. If the "evidence is in equipoise" on the issue of unlawful motive, the General Counsel has not met his burden of proof, and the employer prevails. If the General Counsel succeeds in showing by a preponderance of the evidence that the unlawful reason was a motivating factor in the employer's action, and also that the employer's asserted lawful motive is a pretext, then the General Counsel prevails, since he has shown that there was only an unlawful motive for the dismissal. However, if the General Counsel succeeds in showing by a preponderance of the evidence that the unlawful reason was a motivating factor in the employer's action, but is unable to disprove the existence also of a lawful motive, then the ALJ moves to a second stage of analysis.[6] The aspect of the Board's *Wright Line* test that is at issue here involves only this third category of cases, in which the preponderance of the evidence establishes that the employer has two "real motives," thus requiring the ALJ to move to a second stage.

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[6]The Board's statement in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899, (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), that the General Counsel must make a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" must be read in the light of its earlier statement that it did not intend by adopting the *Mt. Healthy* burden-shifting procedure to depart from "the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence" (251 N.L.R.B. at 1088 n.11). Thus, what the Board refers to as the General Counsel's "prima facie" showing of unlawful motive involves consideration not only of the evidence introduced by the General Counsel, but also of any employer evidence that tends to disprove the existence of an unlawful motive. In the initial stage of analysis the General Counsel must meet a "burden of persuasion" on the issue of the existence of unlawful motive. As we stressed in our opening brief, the General Counsel's "prima facie" case is not equivalent to the "prima facie" case of the Title VII plaintiff under *Texas Department of Community*

At the second stage the Board gives the employer the opportunity to avoid a finding of a violation by establishing as an affirmative defense that it would have dismissed the employee for the legitimate reason, even in the absence of the employee's protected activity.[7] The inquiry at this stage is designed not to identify the "real motive"—it has been established in the initial stage of proof that there were at least two "real motives"—but to answer the question of what the employer would have done in a hypothetical situation. As we show in our opening brief, longstanding Board practice and express congressional approval support the Board's decision in *Wright Line* to place the burden of persuasion on the employer in this hypothetical inquiry —which is consistent with the normal practice for establishing an affirmative defense. The result is not that the

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Affairs v. *Burdine*, 450 U.S. 248 (1981). Rather, it amounts to the proof of discriminatory motive the Title VII plaintiff must make at the end of the third step described in *Burdine*. Thus, the argument that the Board should employ the *Burdine* approach following the General Counsel's showing (see, *e.g.*, Chamber of Commerce Br. 11-18) simply does not make sense.

As the description in the text and the cases cited at page 31 note 19 of our opening brief indicate, respondent is wrong in stating that the General Counsel is required to show only an employee's participation in protected activity (Resp. Br. 14). In addition, the statement of amicus curiae Council on Labor Law Equality (COLLE Br. 21) that "before the employer is ever called upon to produce evidence, both the Board and amicus [AFL-CIO] assume that liability has been resolved against him" is plainly inaccurate. Nor is the Chamber of Commerce correct in describing the General Counsel's prima facie case as a "rebuttable presumption" (Chamber of Commerce Br. 20).

[7]Amicus curiae AFL-CIO suggests that in fact a violation has been proved at the first stage of the inquiry, in which the General Counsel proves the existence of an unlawful motive by the preponderance of the evidence, and that the second stage of the inquiry really addresses the question of remedy (AFL-CIO Br. 4, 9-12). We believe that under the statute the Board could have chosen this approach. However, the Board has elected to permit the employer to avoid a finding of a violation altogether if it can establish the affirmative defense. The Board's choice

employer bears the burden of disproving the elements of a violation of the Act or that the General Counsel has been freed of his burden of persuasion. The General Counsel has been found to have carried the burden of persuasion at the earlier stage of inquiry, at which he was required to show by a preponderance of the evidence that the employer had an unlawful motive for dismissal of the employee. Thus, the Board's *Wright Line* test is fully consistent with traditional principles of proof and the statutory standards cited by respondent.[8]

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of the latter approach rather than the one advocated by the AFL-CIO cannot affect its ability to allocate the burden of proof on various issues in a manner that is sensible and that has been approved by Congress.

The AFL-CIO also suggests (AFL-CIO Br. 24-25) that this case should be remanded to the Board because it is unclear whether the Board concluded by a preponderance of the evidence that Santillo's discharge was motivated by his union activity. However, as the AFL-CIO points out (AFL-CIO Br. 25 n.20), the ALJ found that "a preponderance of the evidence establishes that [respondent's] decision to discharge Santillo * * * was motivated by a desire to discourage union activities" (Pet. App. 39a) and that "[respondent] would not have fired Santillo * * * but for his Union activities" (*ibid.*). We believe it is clear that the Board adopted those findings (see Pet. App. 10a-13a) and that a remand therefore is unnecessary.

[8]Contrary to respondent's contention (Resp. Br. 23-27), the legislative history of Section 10(c) of the Act, 29 U.S.C. 160(c), is not ambiguous on the issue of burdens of proof. The colloquy between Senators Pepper and Taft (Resp. Br. 24-27 n.15) makes clear that they were talking about placing on the employer the burden of persuasion, and not merely a burden of production, to show that an employee discharged for cause. Senator Taft stated that the conference report required the employer "to make the proof," which was "the present rule and present practice of the Board." As shown in our opening brief (at 14-16), under the Wagner Act an employer whose action was shown to have been motivated by unlawful considerations had the burden of persuasion on the issue of whether the employee would have been discharged for cause in any event.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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